IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 75 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PATHAN SAMSHERKHAN RASULKHAN

Versus

AMATHABHAI M DESAI

Appearance:

MR JOSHI FOR MR PM THAKKAR for Petitioner

MR AMIT J SHAH for Respondent Nos.1 & 2

MR ND GOHIL,PUBLIC PROSECUTOR for Respondent No. 3

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 22/12/2000

CAV JUDGEMENT

1. This is an appeal filed against the judgment and order dated 7.6.1991 of the Metropolitan Magistrate in Criminal Case No.1335 of 1983 acquitting the accused (respondent nos.1 and 2) for the offence punishable under

sections 323, 355 and 114 of the Indian Penal Code.

2. The appellant who is original complainant has alleged that respondent nos. 1 and 2 who were Police Inspector and Police Sub Inspector respectively of Astodia Police Station at the relevant point of time, had allegedly beaten up the appellant causing simple injuries and acting in excess of, or beyond the course of duty. The principal ground on which the order of Metropolitan Magistrate has been attacked is that the evidence by way of complaint and deposition of the complainant is orroborated by the medical evidence as well as deposition of one Kasturji Rupaji who is stated to be an independent witness and inspite of that, the accused respondents have not been punished.

3. The facts of the case are that on 23.11.1983 at around 9.00 a.m. the complainant who was serving with one Abhaykumar Chunilal had come on duty at the Handcart (lari) at Manekchowk, Tilak Medan. It is the say of the complainant that about 7 to 8 police constables had come at that point of time and he was told by them that he was required at the Astodia Police Station and hence he accompanied them to the police station. That both the accused-respondents as well as other police officials were present when they reached police station and on seeing the complainant the accused-respondent no.1 called for garland of shoes and put it in the neck of the complainant. Then the complainant was made to sit in the jeepcar along with the accused - respondent nos. 1 and 2 with other four police constables and the jeepcar was driven to Sankadisheri. The jeepcar was stopped at Sankadisheri. Thereafter, along with the garland of shoes in the neck the complainant was asked to get down and two policemen caught his hands and two other policemen caught his hair. Accused - respondent no.1 beat the complainant with stick on the buttock as well as hand chop on the neck. It is further stated that the accused respondent no.2 gave hand chop in the back and also slapped the complainant. The complainant was made to walk from Sankadisheri to Tilakmedan and at that point of time two policemen had caught hold of his hands while two other policemen had caught hold of his hair while accused no.2 gave him 2 to 4 kicks in the back. Again he was kicked and slapped at Tilakmedan and when he fell down because of the kicks, the accused - respondent no.2 climbed on his chest and slapped him many times on both the cheeks. Thereafter, the complainant was made to stand up and the accused respondent no.1 kicked him on both the buttock. Thereafter the complainant was again taken from Tilakmedan to Sankadisheri and from there to

Astodia Police Station. It is the say of the complainant that at about between 11.00 to 11.30 a.m. they reached the police station and thereafter he was sent to Civil Hospital for treatment. It is further stated by the complainant that if doctor questions him about the injuries he should reply that he had fallen down and that if he would not say so, he would be doubly beaten in the evening. The complainant further stated that they returned at 3.00 p.m. to Astodia Police Station and criminal case under sections 323, 504 and 506 of the IPC was made out against him and he was put in the lock up. The complainant thereafter stated that he was produced before the Magistrate at 12.00 noon on 24.11.1983 and Mr.N.M.Desai was the Magistrate who inquired of the complainant whether he desired to state anything against the police. It is stated that at that point of time the complainant stated that he was beaten up by the police, and therefore, the Magistrate asked him to undress and then after noting down the injuries yadi was prepared and he was sent to the Civil Hospital along with yadi. It is further stated that he was granted bail in the criminal case which was filed against him. The complainant has further stated that the reason for beating him up, garlanding him with shoes was that the accused respondents were asking for money and that because the complainant had refused, the accused had decided to take revenge and for the purposes of threatening other lariwalas the complainant was beaten up.

4 The Metropolitan Magistrate has acquitted the accused - respondents in view of the fact that primarily the evidence of the complainant does not get corroboration from any independent witness or even from medical evidence; and further, sanction under section 197 of the Code of Criminal Procedure has not been obtained. As against this the case made out on behalf of the appellant is :-

i) there is no reason to discard the evidence of injured complainant,

ii) the location of the injuries on body have been clearly stated and this has been corroborated by the evidence of the doctor,

iii) that mere absence of corroboration does not justify ignoring evidence of the complainant and,

iv) that the act which is not done while carrying on out official duty cannot be brought within the purview of provisions of section 197 of the Code

of Criminal Procedure.

5. In view of the fact that Mr.Joshi, learned Counsel appearing on behalf of the appellant contended very forcefully, I have scrupulously gone through the evidence on record, including the original depositions of the complainant, one Kasturji Rupaji who is stated to be an independent witness, Dr.V.K.Acharya, as well as medical certificate. However, I have not found any valid reason to interfere with the finding and the conclusion arrived at by the Metropolitan Magistrate for the following reasons.

6. Before discussing the evidence as well as findings of the Trial Court, the issues which were framed by the Trial Court and the decision thereupon are reproduced as under :-

1) Whether the prosecution is able to prove that the accused no.1 put the garland of shoes in the neck of the complainant with an intention to humilitate him and whether he used force with the intention to assault and cause injuries ?	Negative
2) Whether the prosecution is able to prove that the accused no.1 beat the complainant on the buttocks with the stick and whether that handchop on the neck was given wilfully so as to cause hurt ?	Negative
3 Whether the prosecution is able to prove that accused no.2 beat the complainant on different parts of the body and slapped him on the cheeks as well as beat him on the back of elbow of the right hand so as to wilfully cause hurt ?	Negative
4 Whether the prosecution is able to prove that the complainant was threatened by the accused that if he would not state in the Civil Hospital that he	Negative

had fallen down he would be doubly beaten up and whether such threat was given?

5 Whether it is proved that the accused have committed any other offence ? Negative

6 What order? As per final order.

7. The complainant Pathan Samsherkhan Rasulkhan has been examined and his deposition recorded under exhibit 3; Dr.Vinodchandra Keshavlal Acharya has been examined under exhibit 4, medical certificate is at exhibit 6 and deposition of Bhikhabhai Manilal, Clerk of the Court is at exhibit 8. While FIR in Criminal Case No.973 of 1983 against the complainant Pathan Samsherkhan Rasulkhan is at exhibit 9 and the deposition of Kasturji Rupaji, prosecution witness no.4 is at exhibit 10.

8. On going through the deposition of the complainant on which great emphasis was laid by the learned Advocate for the appellant, I find that he has categorically admitted in the cross examination that firstly, neither accused no.1 nor accused no.2 had any relation with the complainant; secondly, that accused nos. 1 and 2 never used to visit the lari of the complainant, thirdly, that Abhaykumar Chunilal who is the owner of the lari (at which the complainant is serving) is on the main road and hence number of non cognizable complaints have been filed against Abhaykumar and in his absence against the complainant; fourthly, that on 23.11.1983 some policemen had come to call the complainant with reference to incident of previous day i.e. 22.11.1983 and these policemen were not accompanied by accused nos. 1 and 2. In the cross-examination, it is further submitted that when the complainant was brought from Police Station to Tilakmedan, it was about 10.15 to 10.30 in the morning and on the road from Sankadisheri to Tilakmedan there was lot of traffic and movement of many people. It is further stated that most of the shops in Manekchowk Tilakmedan open about by 9.00 a.m. When the complainant was taken there all the shops were open and because the complainant was wearing garland of shoes many people had come out from the shops to see this. It is further admitted that other lariwalas were also present and when the complainant was beaten up there

was large crowd standing around but neither the lariwalas nor any shop owners had come forward to stop the accused from beating the complainant. In the cross examination what is stated further is very pertinent, in as much as the complainant states that he knows the lariwalas who were present but till date of deposition he has not given name of any of the eye witness either in the complainant or in his deposition. He further admits that when he was sent along with the police constable to Civil Hospital on 23.11.1983 accused no.1 had said that if the complainant would tell to the doctor about being beaten he would be doubly beaten up in the evening and this part of his complaint is got written forcibly.

8. The learned Advocate for the appellant then focussed on the deposition of Dr.Vinodchandra Keshavlal Acharya. It was pointed out that the doctor had categorically stated that in his opinion the injuries described in the medical certificate at exhibit 6 could be caused by the kicks, beating with sticks or slaps. In the cross-examination, the evidence in the form of deposition of the doctor has come on record whereby he has stated that the injuries at sr.nos. 1 and 2 are such that they cannot be seen with the naked eye and such injuries may be existing or they may not be existing. For the purposes of appreciating this part of the deposition the injuries are listed herein below :

[1] Tenderness over scalp (head)
[2] Redness of Right eye.
[3] Tenderness on Right side neck behind left ear.
[4] Contusion on Right supresepalam Region Size 3"X1".
[5] Contussion on left supresepalam Region size 4" X 2".
[6] Contusion on both buttocks size 7" X 4" on left side buttocks size 5" X 2" on Right side.

The doctor has further stated that the contusions and their age (period) can be ascertained from the colour, however, it is admitted that in the certificate (exh.6) no colour of the contusions has been mentioned and that all the injuries are simple injuries. It is further stated that in case the accused tries to avoid arrest and if the police use hard and blunt object then also such injuries can be caused. Moreover, it is stated that except for the note made by the Eye Hospital he does not have personal knowledge about the nature of the injury to the eye. Once again, it is reiterated that in view of the fact that the colour of the injuries

(contusions) has not been noted it is not possible to state as to when the injuries were caused. Thereafter, on re-examination in chief, it is stated that the reason of not noting the colour of injuries is nothing else but rush of work in the hospital. The deposition of the doctor is at exh.4.

9. The next deposition on which the learned Advocate for the appellant relied upon was that of one Kasturji Rupaji which is at exh.10. The Trial Court has not accepted the version or it may be stated that it has doubted the presence of this witness at the place and time of incident. In the statement, the witness has stated that he was standing at around 10.30 a.m. on 23.11.1983 near Pangalla when Samsherkhan was brought by four policemen and two officers with garland of shoes in his neck. The witness has further reiterated what was stated by the complainant in his deposition in chief. In the cross-examination, it is deposed that he knows the complainant since last ten years but he has no friendship with the complainant. Further, it is stated that the complainant met him a week after the incident and the witness told him that if the complainant has any work he is prepared to help the complainant in any manner. The complainant then told Kasturji Rupaji that he is required to depose in his favour and the complainant told him that he i.e.Kasturji Rupaji must appear as witness. In so far as the deposition as to timing is concerned, on which aspect the Trial Court has doubted the presence of this witness at the scene of the occurrence, the witness states that he is carrying on business of Bhajipau in Manekchowk and in the morning at around 9.00 O'clock or 10.00 O'clock he goes to purchase the vegetables from Rajnagar Market in Dhalgarwad. He does not use scooter for going to vegetable market and he purchases masala from Laxmi Pan House which is past Manekchowk and near street of Pratap Cinema just outside the Carona House. He further states that he does not know the time that is taken in vegetable market but he returns home by around 12.00 Noon. Thereafter, it is stated that immediately after purchasing masala he would go away and would not stand without any work and on the day of the occurrence he had reached Laxmi Pan Shop at Ten O'clock in the morning and he waited for one-half hour there. It is further admitted that there is lot of movement of traffic and people since Eight O'clock in the morning in Manekchowk area and near his lari there are shops of gold and silver ornaments as well as the shops of traditional clothes and such shops open at 9.00 a.m. in the morning and on the day of the incident all the shops were open. The witness had seen four policemen from about 200 feet

distance and all the shop owners had also come out to see the incident. That he does not know the names of four policemen nor does he know as to which police station the four policemen belong. It is further stated that four policemen and two officers were walking near each other and that two policemen caught hold of hands of the accused and two other policemen had caught hold of his hair and they were bringing him while beating. That at the place of the incident lot of people were present and when the witness was standing near panshop lot of traffic was also moving. That though the witness knew Samsherkhan since ten years even though he was being beaten, the witness did not say anything.

10. On the basis of the aforesaid depositions of the complainant, doctor and the witness Kasturji Rupaji, the prosecution has tried to make out a case that both the accused , viz. respondent nos. 1 and 2 were responsible for beating up the complainant on 23.11.1983 and that their action was, though denied by them, proved by the medical evidence on record as well as the statements of the complainant and the witness.

11. As against this, the case of the defence before the Trial Court is that one Abdulrahim Abdulgafur had lodged a complaint in Astodia Police Station on 22.11.1983 against the present complainant and one Abhaykumar for commission of offence punishable under sections 323, 506(2), 504 and 114 of the Indian Penal Code. A copy of the said complaint was produced in the present case before the Trial Court and it was stated that the complainant had been brought to the police station by the police constables for the purpose of investigation on 23.11.1983 at about 9.30 a.m. That when the complainant was brought by the constables to Astodia Police Station there were visible mark of injuries on the body of the complainant and hence accused no.1 enquired of the complainant about cause of such injuries. It is the say of accused repondent no.1 that the complainant told him that it was because the police constables had beaten him and therefore accused no.1 directed the complainant to lodge a complaint in the police station against those police constables. However, the complainant did not choose to do so and hence yadi was prepared in the police station and the complainant was sent for medical treatment to the Civil Hospital. It is the further say of the accused respondent no.1 that he asked for the explanation of the injuries from the police constables who brought the accused and the constables informed him that the complainant was behaving in high handed manner and was not ready and willing to accompany

the constables and therefore reasonable force was used against the complainant and in the process the injuries were caused to the complainant. It is the further case of the defence that as the accused respondent no.1 as well as accused respondent no.2 were strict officers and were firm about maintaining law and order as well as smooth movement of traffic, they did not permit the lariwala to spread benches and chairs on the road and as such these lariwala had grudge, prejudice and hatred against both the respondents.

12. It is the say of the defence that taking into consideration the medical evidence, the certificate issued by the doctor mentions these injuries out of which only four injuries are visible while regarding injuries at serial nos. 1 and 3 the doctor himself had deposed that they are not visible and they may be cooked up or false injuries i.e. just made up and it is in light of this evidence that the defence has stated that if the complainant had been beaten mercilessly as alleged not once but many times and that too by more than one person i.e. 4 to 6 persons, the complainant would have received many visible injuries and not only five as recorded in the medical certificate. Therefore, it is contended that the entire story of being beaten by not only the accused respondent nos. 1 and 2 but by other police constables also and that too continuously is a got up story only to involve the accused nos. 1 and 2 in criminal proceedings.

13. It is further stated on behalf of the accused respondents that admittedly both the accused are public servants being Government Officers and at the relevant time they were discharging their duties and therefore before initiating any proceedings prior sanction under section 197 of the Code of Criminal Procedure was necessary and if the same has not been obtained the entire proceedings would be ab initio void and illegal. In support of this contention 1965(1) Cri.Law Journal 499 is relied upon.

14. Taking into consideration the submissions of both the sides, as well as evidence on record no case is made out by the prosecution for interference in view of the fact that as seen from the depositions of the complainant, Dr.V.K.Acharya and Kasturji Rupaji, it cannot be stated with certainty that the incident occurred at the time and the place and in the manner stated by the complainant. Though the incident is alleged to have taken place at around 10.00 a.m. to 10.30 a.m. in the morning in Manekchowk area and both

the complainant and Kasturji have deposed that all the shops were open and there was movement of traffic and there were many people around, the prosecution has not been able to support its case even by citing presence of one person. Furthermore, the medical evidence, on which reliance has been placed, does not carry the case of the prosecution any further in as much as the injuries as described in the medical certificate could be caused either by stick, kicks or slaps or such injuries could be caused by the use of force by the police personnel when the complainant was resisting arrest or going along with the policemen for the purposes of investigation. Moreover, the theory putforth by the defence that if the version of the complainant is correct that he was mercilessly beaten by two accused along with four constables continuously, it is not possible to accept that there would be only four visible injuries as can be seen from the medical certificate available on record is quite probable and reasonable. At least it is a version which is probable and cannot be discarded. The deposition of Kasturji Rupaji also does not inspire confidence as the said witness admits that he has comeforward to depose only on being told by the complainant after about a week of the occurrence of the incident in question. This factor becomes important when one sees the complaint lodged in the FIR wherein Kasturji's name as a witness is not mentioned. As already observed in the FIR, the names of no other witnesses are mentioned even though the complainant himself had admitted in his deposition that many people were watching him being beaten by the accused and the police constables as alleged.

15. So far as the applicability of section 197 of the Code of Criminal Procedure is concerned, the say of the defence that the police officers were carrying on their official duties for the purposes of investigating complaint lodged against the complainant on 22.11.1983 by one Abdul Rahim Abdul Gafur and hence the act which is done during the course of official duty cannot be brought within the purview of provisions of section 197 of the Code of Criminal Procedure appears to be correct. Even assuming without admitting for the sake of argument, that as contended by the complainant, two accused officers were not carrying out their official duty yet it is for the complainant to prove this and in absence of any evidence on record a mere contention cannot absolve the prosecution from seeking statutory sanction under section 197 of the Code of Criminal Procedure. Over and above, the decision cited on behalf of the defence before the Trial Court, Mr.Amit J.Shah, appearing on behalf of the

accused-respondents in the present appeal, has relied upon the case of Kallappa Appanna Bebade Vs. Dattatraya Ramchandra Shejal reported in 1997 CRI.L.J.1190 and another decision in the case of Gauri Shankar Prasad Vs. State of Bihar reported in 2000 CRI.L.J.4031 for the purpose of showing that the Courts have consistently held that once it is shown that if the act complained of by the respondents against the appellant have a reasonable nexus with the official duty of the appellant then necessity of sanction to prosecute such officer is a must and cannot be given a go bye.

16. Therefore, in light of the facts, circumstances and evidence on record, the judgment and order of the Trial Court is hereby confirmed, prosecution having not been able to establish beyond reasonable doubt that the accused - respondents had committed any offence under sections 323, 355 and 114 of the Indian Penal Code read with section 255(1) of the Code of Criminal Procedure and the accused - respondents have been rightly held to be not guilty.

17. In the result, the appeal is accordingly dismissed.

Sd/-
(D.A.Mehta,J)

m.m.bhatt